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In the Supreme Court of the United States

OCTOBER TERM, 1967.
No. 1035.

STATE OF OHIO,
On the relation of
FRANKLIN ANDERSON, *et al.*,
Petitioners,

vs.

MERCEDES COTNER,
Clerk of Cleveland City Council, *et al.*,
Respondents.

BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF OHIO,

In Support of Petition for Writ of Certiorari To the Supreme Court of Ohio.

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Petitioners and respondents have consented to the filing of this brief.

STATEMENT OF THE CASE.

On August 29, 1967, petitioners submitted to the respondent, Mercedes Cotner, Clerk of Cleveland City Council, an initiative petition containing the following resolution:

> "Be it resolved by the people of the City of Cleveland that:
>
> THE PRESIDENT OF THE UNITED STATES SHOULD BRING ALL AMERICAN TROOPS HOME FROM VIETNAM NOW SO THAT THE VIETNAMESE PEOPLE CAN SETTLE THEIR OWN AFFAIRS." (Petitioners' Appendix 7a, 8a.)

In support of their initiative resolution, petitioners obtained 9,954 signatures from Cleveland citizens (Petitioners' Appendix 8a). This was nearly twice the number required by Section 49 of the Cleveland Charter (Petitioners' Appendix 2a).

On August 31, 1967, the respondent Clerk of Council refused "* * * for legal reasons to process the petitions * * *" (Petitioners' Appendix 8a).

On September 5, 1967, petitioners filed a mandamus action in the Supreme Court of Ohio to require the respondent Clerk to ascertain the sufficiency of their petition and to certify it to the City Council as required by Sections 51 and 54 of the Cleveland Charter (Petitioners' Appendix 3a, 4a).

The Ohio Supreme Court denied a writ of mandamus on October 6, 1967, and on October 25, 1967, denied petitioners' motion for reconsideration (Petitioners' Appendix 14a).

Petitioners are now before this Court asserting that the respondents' action has denied them First Amendment rights of free speech and press and the right to petition for a redress of grievances, as well as the equal protection of the law guaranteed by the Fourteenth Amendment.

QUESTIONS PRESENTED.

I.

Where Cleveland City Council, the municipal representative of the people of Cleveland, pursues a longstanding practice of adopting resolutions concerning all manner of issues, including directives to the President of the United States with respect to national foreign policy, and where a group of citizens of the City of Cleveland present a procedurally valid petition to the Clerk of the Council containing a resolution petitioning the President to change the policy of this Nation concerning its prosecution of the war in Vietnam and where such Clerk refuses to certify such petition to the Council for its acceptance or rejection, is there an abridgement of the rights of free speech, press and the right to petition as guaranteed by the First and Fourteenth Amendments to the United States Constitution?

II.

In a situation as described in I, are petitioners denied the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

REASONS FOR GRANTING THIS WRIT.

I.

DENIAL BY A CITY OFFICIAL OF THE USE OF THE INITIATIVE PROCEDURES FOR THE PURPOSE OF PROPOSING A RESOLUTION OF OPINION VIOLATED PETITIONERS' RIGHTS OF FREE SPEECH, PRESS AND THE RIGHT OF PETITION.

A. The First Amendment Freedoms at Stake Here.

Ours is a government republican in form and representative in character. To insure its effective functioning, the framers of our national constitution elevated to a preferred position the freedom to engage in debate, to publish

opinions concerning political issues, and to petition elected representatives with respect to grievances. United States Constitution, Amendment I. This Court has often noted the fundamental importance of these freedoms in a democratic society. *Shelton v. Tucker,* 364 U. S. 479 (1960); *Bates v. Little Rock,* 361 U. S. 516 (1960); *DeJonge v. Oregon,* 299 U. S. 353 (1936).

When the petitioners circulated their petition containing a resolution of opinion on a vital national issue, they were exercising their constitutional right of free speech. The use of a petition, moreover, brought their action within the ambit of the freedom to publish opinions.

But most important is that petitioners' petition was a petition for the redress of grievances directed to our National Government concerning its policy in Vietnam.

The First Amendment explicitly declares that this type of activity is not subject to governmental abridgement. This Court has said that the right to petition is

> "an attribute of national citizenship and, as such, under the protection of and guaranteed by the United States. The very idea of a government republican in form, implies a right of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank,* 92 U. S. 542 (1876).

By the Fourteenth Amendment state governments are precluded from abridging this right to petition. *Hague v. C.I.O.,* 307 U. S. 496 (1939).

Cleveland's Council may adopt, alter or reject the petitioners' resolution. If it rejects or changes it, petitioners can require that it be submitted to the electorate of Cleveland. Section 55, Cleveland Charter (Petitioners' Appendix 4a).

Submission of a question of opinion to an electorate by placing it on the ballot for their approval or rejection has been squarely held to constitute a petitioning for the redress of grievances within the meaning of the First Amendment. In *Spriggs vs. Clark*, 45 Wyo. 62, 14 P. 2d 667 (1932), the Wyoming Supreme Court considered a resolution of that state's legislature requiring the Wyoming Secretary of State to submit to the electorate the question whether the Eighteenth Amendment to the United States Constitution should be repealed.

An injunction was sought to prohibit placing the question on the ballot. It was argued that it would require the unlawful use of tax revenues, that there was not any constitutional or statutory basis for it, and that neither the people of Wyoming nor their legislative representatives could effect the repeal themselves.

In rejecting these contentions, the Wyoming Court stated:

> "It is within the judicial knowledge of this Court that our state legislature has in the past repeatedly, by resolutions duly adopted, memorialized and petitioned Congress concerning dozens of subjects on which that body had power to legislate and in which the citizens of this state have been deeply interested. No one * * * has ever questioned the propriety of so doing." 14 P. 2d 672, 673.

Continuing, the Court concluded:

> "The effect of the resolution now before us is but to present to Congress a memorial, a petition from the people of this state as a whole, expressing their opinions regardless of whether they be for or against the repeal of the Eighteenth Amendment. *If the people's representatives may petition Congress*, as has so frequently been done, in light of the quoted clauses of the state and national fundamental laws, *it is diffi-*

cult to see why the people themselves may not do so * * *." (Emphasis added) 14 P. 2d 673.

Furthermore, it appears that the framers of Ohio's constitution may have foreseen this use of the initiative. In constitutional debate State Senator Theodore E. Burton explained the purpose of the initiative and referendum in this manner:

> "*They provide a method for a test of public judgment upon any question which is of interest to a considerable number of citizens.* Such a test is often denied in a legislative body by the pressure of business, the complexities of parliamentary procedures, or the undue influence of party leaders or powerful interests." *Proceedings and Debates, Ohio Constitutional Convention,* Minutes of March 19, 1912, p. 751. (Emphasis added.)

Whether Senator Burton's remarks flowed from foresight or not, their pertinence here is clear. The initiative power is usually broad. *McQuillin* in his work, *Municipal Corporations,* Vol. 5 (3d Ed), says at page 521:

> "The power of initiative and referendum may be conferred by the sovereignty upon a municipality with respect to any matter, legislative or administrative, within the realm of local affairs; and *often the power, as conferred, is extensive, including all ordinances and resolutions and practically all actions that might be taken by a municipal council.*" (Emphasis added.)

The decision below of the Ohio Supreme Court is a flat denial and, therefore, an abridgement of petitioners' fundamental First Amendment rights. This Court should grant its Writ of Certiorari to insure that the freedom of petitioners and others to petition their National Government in this manner will be protected.

B. The First and Fourteenth Amendments Prohibit Respondent From Denying Petitioners the Exercise of Their First Amendment Rights.

Section A shows that the right to exercise First Amendment Freedoms is at stake here. This section shows that a state may not abridge the exercise of these freedoms.

Initiative procedures, like public buildings, grounds, and the postal system are maintained for public use by the state governments. These governments may not limit the use of these public facilities so that First Amendment Freedoms are abridged.

To illustrate: streets are maintained by governments for the primary purpose of facilitating the flow of traffic, and commerce. However, the streets also lend themselves to the exercise of the First Amendment Freedoms of free speech, publicly assembling to discuss public matters and of petitioning for a redress of grievances. The same may be said for public parks.

While it is clear that governments may reasonably regulate the use of streets and parks they may not do so in a manner that abridges those freedoms.

> "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interests of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; *but it must not in the guise of regulation, be abridged or denied.*" *Hague v. C.I.O.*, 307 U. S. 496 (1939). (Emphasis added.)

The same principle applies here. Cleveland may reasonably regulate the use of the initiative, but it may not

abridge the right of the people of Cleveland to use it to exercise their First Amendment Freedoms.

The postal system furnishes a further analogy. It is settled that the use of the mails may not be separated from free speech.

> "The United States may give up the post office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues." *Lamont v. Postmaster General,* 381 U. S. 301 (1965).

This Court would not sanction an attempt by the post office to prevent the circulation of petitioners' petition through the mails. Nor should it sanction respondents' refusal to permit its circulation to the council and perhaps the electorate of Cleveland through the initiative process. The people of Ohio can repeal the reservation of the right of initiative when they choose to do so, but until they have done so, it is in an area protected by the First Amendment.

For all these reasons, then, this Court should grant its Writ of Certiorari to review the judgment below.

II.

REFUSAL OF A CITY OFFICIAL TO ACCEPT AND PROCESS PETITIONERS' INITIATIVE DENIED PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

When the respondent clerk refused to certify petitioners' initiative petition, she arbitrarily denied them the equal protection of their constitutional right to exercise their inherent legislative power through the initiative procedure.

In their Petition, petitioners have demonstrated that since the Cleveland Council has the power to propose and adopt resolutions similar to that proposed by petitioners,

and since there exists a method by which the people can exercise the same prerogative, Cleveland may not frustrate the right of the people to take similar action. Such an anomaly may not exist.

Because of the Equal Protection principle, petitioners' initiative deserves a broad interpretation of the declarations that all political power (and necessarily, legislative power) is "inherent in the people" and that the initiative is "reserved to the people of each municipality." Ohio Constitution, Article I, Section 2 and Article II, Section 1f (Petition 3).

III.

THIS CASE PRESENTS THIS COURT WITH THE OPPORTUNITY TO DECIDE BASIC QUESTIONS CONCERNING THE NATURE OF THE LEGISLATIVE POWER WHICH IS INHERENT IN THE PEOPLE AND WHETHER THEY CAN EXERCISE THIS POWER THROUGH THE INITIATIVE MACHINERY WHICH THEY HAVE ESTABLISHED IN THEIR STATE CONSTITUTIONS AND MUNICIPAL CHARTERS.

This case offers this Court a unique opportunity to make effective the right of the people to use their initiative procedures for the vital purpose of expressing their opinions on important national political issues. Although national in character, these issues affect the local affairs of each community in the United States. At present the Vietnam issue affects every neighborhood in America in which young men live. By granting the writ of certiorari this Court can insure adequate consideration of the issues surrounding this exercise of political power and freedom.

IV.

THE TEMPER OF OUR TIMES REQUIRES THAT THIS COURT PROTECT EVERY AREA OF LAWFUL PUBLIC EXPRESSION FROM ABRIDGEMENT SO THAT THESE AREAS SHALL REMAIN AVAILABLE TO THE PEOPLE.

In this time of rising tensions, street demonstrations increasingly result in violent clashes between persons of different persuasions and between policemen and demonstrators. Areas of lawful public expression must be kept open to the people who wish to express their grievances peaceably and within the law. The value of the petition for a redress of grievances in this connection has long been recognized. *Cooley* says it is:

> "a sacred right which in difficult times shows itself in full magnitude, frequently serves as a safety-valve if judiciously treated by the recipients, and may give to the representatives or other bodies the most valuable information. Cooley, *Constitutional Limitations*, Vol. I, p. 728 (8th Ed).

This is a time, too, when the fear is often expressed that government is too far removed from the people. Petitioning for a redress of grievances offers the people a chance to participate more directly in their government. And it gives them an opportunity to participate more frequently than the periodic elections of representatives allow.

Furthermore, the initiative process has peculiar virtues as a method of petitioning for a redress of grievances. The voter indicates his opinion in the privacy of the voting booth. He is free from any duress or coercion; his vote in anonymous. It may be, therefore, most truly his own opinion. The results of the petitions are known with an exactitude not possible in other methods of petitioning.

Finally, if petition by initiative is barred there is a loss to society of valuable public discussion of important national issues. Nothing stimulates public discussion in this country so much as elections do. Placing this resolution before Cleveland Council and perhaps the electorate of Cleveland would stimulate much valuable discussion in Cleveland. The electorate would seek to inform itself on the issue. Proponents and opponents would seek to influence opinion on the question. Public understanding of the issue would increase.

It has been said that:

> "The First Amendment is not, primarily, a device for winning of new truth, though that is very important. It is a device for sharing whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal." Meiklejohn, *Political Freedom,* New York, Oxford University Press (1965), page 75.

In addition, in a representative government, it is essential that the representatives be informed of the desires of the citizens they represent. This is a part of our society. Groups of every size and nature seek to make their views known to legislators and executive officers. It is well that they do so, for

> "* * * [s]tatutes, to be sound and effective, must be preceded by abundant printed and oral controversy. Discussion is really legislation in the soft." Chaffee, *Free Speech in the United States,* p. 361, Harvard University Press (1941).

The same may be said of policy.

CONCLUSION.

Fundamental freedoms crucial to our democratic society are at stake here. Unique questions concerning the inherent political power of the people are involved. The stress of the times requires that this Court preserve inviolate the reserved and guaranteed rights of the people to political expression.

To resolve these issues this Court should grant its Writ of Certiorari.

Respectfully submitted,

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